Brussels, 23rd September 2021

EACB comments on Commission's Proposal for a Directive of the EP and the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms

General comments

We appreciate the EC efforts in tackling the inadequate enforcement of the right to equal pay, but we have concerns that current proposals do not sufficiently reflect factual and legal reality and may excessively overburden employers.

The EC's assumption of a gender pay gap in the EU of 14% seems excessive. We believe that it refers to the unadjusted pay gap, which does not consider differences in the derivation of pay differentials such as the type of job, work experience, qualifications, different employment biographies and the resulting poorer access opportunities for women with regard to certain occupations or career stages. As a comparison, the adjusted pay gap in Germany is currently around 6%.

The draft proposal does not foresee the special treatment or certain exemptions for collective bargaining/ agreements. We believe that it is relevant to take this specificity in to account as in number of EU Member States collective agreements are legally binding (e.g. Germany) and as such they are aimed to ensure variety of labour rights ("legal minimum"), including those according to which employees are remunerated irrespective of gender.

Specific comments

Article 2 (Scope)

In view of the considerable bureaucratic burden that would be caused by the proposed regulations on companies, there should be a special treatment or recognition of collective agreements. Ideally they should be excluded from the scope/ parts of the Directive. We refer to those elements/parts/provisions of the Directive which are normally dealt by in the collective agreements. Collective agreements negotiated on a parity basis ensure that employees are remunerated irrespective of gender. As this ensures a non-discriminatory pay system, there is no need for objective criteria to evaluate work of equal value or for further instruments to create wage transparency. Additional measures which are detached from the collectively agreed remuneration system or which are additionally directed towards the evaluation and determination of remuneration criteria would enter into inadmissible competition with the collectively agreed definitions and restrict the autonomy of collective bargaining. The inclusion of companies in the scope of the proposal whose remuneration is based on collective agreements seems contradictory to the principle of proportionality.

Article 4 (Equal work and work of equal value)

While the requirements for the assessment of equal work or work of equal value in paragraph 4 are broad, they nevertheless do not take into account the diversity/complexity of company activities. Additionally, it is unclear what is meant by a hypothetical comparator or what could be other evidence which would allow to presume alleged discrimination referred to in paragraph 4.More clarity would be welcomed.

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Moreover we disagree that the assessment should also include employees who were employed at the different time than the employee in question. Remuneration systems, rules of job evaluation, are subject to changes and they cannot be determined in isolation from the time during which the work is performed and from the framework conditions of the work that apply at the time.

Article 5 (Pay transparency prior to employment)

In view of the legal provisions already existing in some Member States, which prohibit gender-based differentiation in pay, far-reaching information obligations on the part of the employer in the application process are neither necessary nor justifiable. Furthermore, such information could also run counter to the company's legitimate interests in secrecy. In this respect, the employer's interests in protecting company data/trade secrets are disregarded by Article 5. Furthermore, it is not reflected that the employer must be able to adapt the remuneration offer to the individual skills, the know-how brought along and the previous remuneration of the applicant in order to be sufficiently attractive with regard to the individual applicant. Thus, while remuneration offers can and must be set in isolation from gender, they cannot be set without regard to individual qualities and qualifications, as well as job-related experience and individual expectations.

Article 7 (Right to information)

According to para 1 the right of information on their individual pay level and the average pay levels shall apply for workers of all companies regardless of their size. This measure will increase the administrative burden also for smaller companies. The obligation of the employers to inform employees about the right to receive information on an annual basis has to be rejected. From the point of view of efficiency, the practice should be that the employee representatives are responsible to provide such information to all workers.

German law already provides for a corresponding right to information to ensure pay transparency (EntgTranspG). The right to information regulated in Article 7 goes beyond this insofar as again no relief is provided for small and medium-sized enterprises. In the sense of a consistent application of the proportionality principle, corresponding exceptions must therefore be added to Article 7.

In order to reduce the bureaucratic burden, the annually recurring information obligation for employers in para. 2 should be deleted, as no added value arises for employees from the annual repetition.

Article 8 (Reporting on pay gap between female and male workers)

The detailed reporting obligations of Article 8 for employers with at least 250 workers are excessive and would cause a huge administrative effort for the affected companies. In addition, according to para 2 the accuracy of the information shall be confirmed by the employer's management.

Therefore we suggest deleting para 1 point (c) to (g).

Furthermore, in our opinion, it is not necessary to publish the information on the website (para 3). The submission to the workers' representatives appears to be sufficient.

The special position of companies bound by or applying collective agreements must also be taken into account here. The reference to the relevant collective agreement must be sufficient. The bureaucratic burden associated with the reporting obligation is also disproportionately high, so that the scope of application - e.g. national implementation in Germany - should be limited to companies with more than 500 employees.

Article 9 (Joint pay assessment)

On the basis of Article 9 Member States shall take appropriate measures to ensure that employers with at least 250 workers conduct, in cooperation with their workers' representatives, a joint pay assessment. The Joint Pay assessment between employer and employee representatives required in Article 9 represents a massive additional effort which is not necessary in view of the already existing legal requirements and also in view of other regulations contained in the proposed Directive. The Joint Pay assessment should only be considered between the employers and the employee representatives. It is not justified to make the joint assessments available to all workers. Instead, we recommend an obligation to communicate appropriate measures to all employees.

Moreover, there is an urgent need to clarify in what form the employer can present objective and gender-neutral factors in advance of the pay evaluation required by Article 9, in order to avoid the expense of the Joint Pay assessment.

Article 10 (Data protection)

The protection of personal data of employees affected by a request for information must be specified. According to the national implementation in some Member States, comparative pay does not have to be disclosed if the comparative activity is carried out by fewer than six employees of the other gender. Only in this way can the individualisation of the information be effectively avoided. The protection of personal data is a European right.

Article 13 (Procedures on behalf or in support of workers)

The possibility of including associations, organisations, equality bodies and workers' representatives or other legal entities is too far-reaching. More concrete conditions for the assumption of a legitimate interest would have to be regulated, based on a concrete need for legal protection.

Article 14 (Right to compensation)

In para 2 the term 'dissuasive' seems superfluous because the effective compensation shall be proportionate to the damage suffered anyway.

The claim for compensation provided for by Article 14 is too far-reaching in terms of content (i.e. *full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities and moral prejudice*) and is also likely to contradict national statutes of limitation. For the sake of legal certainty, the text of the Directive should contain appropriate restrictions.

Article 19 (Legal and judicial costs)

Insofar as Article 19 is intended to cover the reimbursement of costs to the prevailing party also with regard to the costs of engaging a legal representative, is contradicting at least to some national legislations where the cost of legal representative is excluded. For instance in Germany) the winning party has no corresponding claim in first instance proceedings. Overall, the obligation to bear costs as regulated in Article 19 is an unreasonable privileging of employees which in our view is not justified.

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